1980

Jay A. Lembach v. Barbara A. Cox : Brief of Appellant

Utah Supreme Court

David E. Leta; Roe and Fowler; Attorneys for Appellant;
Bruce Plenk; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

JAY A. LEMBACH,	)	
Plaintiff-Appellant,	)	Docket No. 17095
vs.	)	
BARBARA A. COX,	)	
Defendant-Respondent.	)	

BRIEF OF APPELLANT

Appeal from a Judgment of District Court of
Salt Lake County

Honorable Kenneth Rigtrup, Judge

David E. Leta
ROE AND FOWLER
340 East Fourth South
Salt Lake City, Utah 84111
Attorneys for Appellant

Bruce Plenk, Esq.
Utah Legal Services
352 South Denver Street
Salt Lake City, Utah 84111

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BRIEF OF APPELLANT

NATURE OF CASE

This is an action brought by the natural father (plaintiff) of a child born out of wedlock against the child's natural mother (defendant) for custody of the child. The mother counterclaimed for custody and also sought an interest in the father's property. The property claims were settled by the parties without trial and are not involved in this appeal.

DISPOSITION OF THE CASE IN THE TRIAL COURT

Upon a trial to the court, the Honorable Kenneth Rigtrup presiding, and after past trial motions, the court entered an Amended Judgment (R. 175) and Amended Findings of Fact and Conclusions of Law (R. 171) awarding custody to defendant and granting plaintiff reasonable visitation.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Amended Judgment and remand of the case to the District Court with directions to enter judgment in favor of plaintiff that he be awarded custody of the parties' child, with liberal and reasonable visitation for defendant, or, in the alternative, reversal and remand of the case to the District Court for new trial with directions as to the proper standards to apply in resolving the issues in dispute.

STATEMENT OF FACTS

Plaintiff and defendant are the natural father and mother of Thaddeus Justin Lembach, born August 15, 1978. The parties have never been married, but they resided together in plaintiff's residence at 781 First Avenue, Salt Lake City, Utah, between October, 1977, and June, 1979. After the child's birth and until June 6, 1979, the parties jointly cared for and raised the child at plaintiff's home. Each of the parties took an active and substantial role in providing the child with love, attention, care and guidance, although plaintiff provided virtually all of the financial support. In all material respects, the parties conducted themselves as "a family."

In June, 1979, the parties separated, and defendant took the child with her to her parents' home in Connecticut and to visit friends in Nova Scotia, Canada. In August, 1979, because defendant wanted to travel to Ireland, the parties agreed that plaintiff would care for the child in Salt Lake City, Utah, during that month. On September 4, 1979, fearing defendant's threats to deprive him of parental rights by forcibly removing the child from the State of Utah (Verified Complaint, paragraph 9, R. 3) plaintiff initiated the instant

action and obtained an order granting him temporary custody and support of the child (R. 17). After a hearing on September 14, 1979, the court entered a stipulated temporary custody and support order (R. 24) granting plaintiff and defendant "joint" responsibility for the custody and care of the child on an equal basis pending trial.

In connection with a pre-trial motion by defendant to dismiss plaintiff's complaint, the court expressly found and concluded that:

> plaintiff has adopted the minor child by acknowledgment "for all purposes" in accordance with 78-30-12, Utah Code Annotated (1953), and that plaintiff has a right to custody in accordance with the "best interest of the child" as shall be determined at the time of trial. (R. 88)

A trial on the merits was held before the Honorable Kenneth Rigtrup on March 12, 1980. Dr. Leslie Cooper, a licensed clinical psychologist and professor at the University of Utah, conducted a pre-trial evaluation of both parties, prepared a written report (Ex. P-1), and testified at trial (R. 232-264). In his report, Dr. Cooper made the following observations and recommendations:

> I believe that both Barabara and Jay both sincerely love and care about Thaddeus, quite apart from their using him and his care as a means of manipulating the other. I believe that Thaddeus feels very comfortable with and is attached to both Barbara and Jay. I could find little evidence from a physchological perspective to support the claims made by each party as to why the other should not have custody. I could find no evidence that Jay is so emotionally disturbed as to be a danger to Thaddeus' psychological growth. Nor could I find evidence that Jay was irresponsible in his behavior toward Thaddeus. At the same time, I could find no evidence that Barbara is suffering from a severe emotional problem.
>
> On the basis of these psychological considerations, it is my recommendation that Barbara and Jay be given joint custody of Thaddeus, if the court can find means of terminating the manipulation of one another. A legal decree may stop the threats

> of "each taking Thaddeus from the other." Their dependency on each other in caring for Thaddeus must end, and each must find his/her own solutions to the problems which arise in caring for Thaddeus when is is with them. Constructive means must be found to negotiate mutually acceptable solutions to common child rearing problems which naturally arise. I believe the present joint custody procedures could be continued, or the stay might be lengthened to a week.
>
> There are problems with such a recommendation, namely, that the conditions required for its success cannot be legislated. Were the implimentation of this recommendation not feasible, it would then be my recommenation that Barbara be awarded custody of Thaddeus, and Jay be awarded liberal visitation rights. Such rights would not necessitate the need for supervision. In view of the plans of Barbara to move to the East if awarded custody, Jay's visitation rights should be for relatively long blocks of time such as over a summer and/or for extended vacation periods.

At trial, Dr. Cooper testified that it would be "best" for the child to maintain a "strong relationship" with both parents (R. 237). With respect to the defendant's willingness to facilitate such a relationship between the child and plaintiff, he testified as follows:

> Q (By Mr. Leta) In your conversations with Mr. Lembach, did he ever say to you that he had any intention of precluding Barbara from having a meaningful relationship with Thaddeus?
>
> A Not as such, that I recall.
>
> Q Looking at the other side of the picture, in your conversations with Barbara, did she ever indicate or say anything to you that suggested that she did not want Jay to have a meaningful relationship with Thaddeus?
>
> A Yes, she did.
>
> Q What kind of things did she say in that regard?
>
> A She stated that not only did she feel that Mr. Lembach should not have custody, but he should be given no visitation rights. And if visitation rights were given, they ought to be supervised.

Nevertheless, Dr. Cooper believed that joint custody would be "best" for the child. He made an alternate recommendation, however, that defendant have custody with long blocks of unsupervised visitation for plaintiff because the joint custody situation "is problematic" when the parties "live a great distance apart from one another" (R. 247-248).

Dr. Richard Schneiman, a specialist in child psychology and development and former child psychologist at Primary Children's Medical Center, also evaluated the parties and testified at trial (R. 165-191). Dr. Schneiman stated that both parties were "psychological parents" for the child (R. 268). However, as between the parties, Dr. Schneiman observed that plaintiff was more willing to accept defendant, more willing to engage in accomodation and/or compromise with defendant, more flexible, had greater trust, and exerted greater effort to be fair about sharing the child (R. 269, 272). As with Dr. Cooper, Dr. Schneiman testified that the "ideal" situation would be to order "joint custody" based on an "equal distribution of time" (R. 273), but that such a situation "becomes very difficult if defendant chooses to leave the area because of the geographic distances involved" (R. 273).

Dr. Schneiman testified that children who are raised by one parent have a "greater likelihood of developing emotional problems" (R. 275). He also stated that children who are raised by parents who reflect animosity and hostility toward the opposite parent not only have difficulties relating to the non-custodial parent but in 80 percent of the cases experience divorce in their own marriages (R. 276-277). Such children have a higher incidence of "acting out" and experiencing "serious emotional disturbances," in his opinion

(R. 277). In light of this research, Dr. Schneiman expressed the view that the "most overriding factor" in selecting a custodial parent would be the "willingness of the divorced parents to negotiate and accommodate a shared way of raising the child" (R. 275).

Based on his observations of the parties, Dr. Schneiman's preference would be to place the child in the physical custody of the parent "who's the most flexible and accommodating of the parties" (R. 279). Dr. Schneiman also expressed the opinion that, as between the parties, the defendant was less likely to follow through with whatever the court were to order (R. 282). Finally, Dr. Schneiman testified that plaintiff had a "greater ability to negotiate solutions" than did defendant (R. 290) and that it would be important for the child to maintain a strong "father-son relationship" with plaintiff (R. 290).

In addition to the differences stated above, the evidence showed significant economic differences between the parties. Plaintiff owned a home, had regular income and had employable skills as a carpenter. Defendant, on the other hand, was unemployed, depended on welfare for her support, had made "no effort" to find employment, had no permanent residence, had not earned any significant income in the last three years, and had no definite plans for the future other than to move back to Connecticut to live with her parents. Neither of defendant's parents testified. Furthermore, defendant admitted that she was very hostile and agressive toward plaintiff (R. 348) and that she did not want him to visit the child without the supervision of another adult (R. 348).

On the basis of the foreging evidence, the court entered its initial findings of fact, conclusions of law and judgment (R. 137, 140). The court awarded custody of the child to defendant because of a "maternal presumption" that young children should be with their mothers unless they are unfit (R. 172, 383), because plaintiff was "insensitive" and "selfish" toward the defendant in refusing to marry her (R. 361, 382, 386), and because plaintiff refused to "accept his responsibility" to legitimate the child through marriage (R. 361).

After trial, plaintiff moved to amend the judgment and, on the basis of newly discovered evidence, moved for a new trial. The court partially granted the motion to amend but denied a new trial. This appeal ensued.

ARGUMENT

I

THE COURT APPLIED ERRONEOUS LEGAL STANDARDS IN RESOLVING THE CUSTODY DISPUTE BETWEEN THE PARTIES.

From the record it is difficult to ascertain with precision what legal standard the trial court applied in resolving the custody dispute beween the parties. It is clear, however, that the court did not apply the same standard to plaintiff as it did to defendant and, in fact, applied tests which were contrary to law.

At the conclusion of the trial, the court said:

> . . . I have a difficult time accepting the concept of lack of flexibility on the part of the defendant, in view of your [plaintiff] apparent lack of flexibility in terms of accepting paternal responsibility in a direct sort of way.
>
> The Court, a year later, has legitimized the child, has adopted the child, and the plaintiff has adopted the child through acknowledgment of paternity under the statutes of the State of Utah, but it's clear that the child was, under the law, bastard for a year. It appears to the Court that you've been selfish, that you've wanted to exercise your rights and privileges, much to the exclusion of the defendant, on your terms and on your conditions, and I think you've been very insensitive to her problems. She has had some emotional adjustments to make. Maybe fathers do, but we don't have them in the physical and emotional sense, as women do. We don't go through the physical and psychological changes that they do.
>
> I have a hard time understanding the view, in view of those circumstances, why you didn't legitimize that child by marriage and accept that responsibility, even if it would result in a divorce, so that at the time of the birth it was a legitimate child. I'm going to award custody to the defendant. The testimony of the experts is clear that they see neither one of you as unfit. I think there is no disagreement with either of them that the Court really shouldn't interfere with the child having a strong relationship with both. I think it's obvious to the Court that it is in the best interests of the child that it have two parents. She's not got the emotional support from you, and it appears natural that she would want to go back where her family is. . . (R. 381-382). (emphasis added)

It is apparent from the foregoing that the court preconditioned plaintiff's right to custody upon some sort of ill-defined showing that he was "sensitive" to defendant's "emotional adjustment" and that he had "accepted parental responsibility in a direct sort of way" by "legitimizing" the child through marriage "even if it would result in a divorce." This standard imposes a greater burden upon the natural father of the child than upon the child's natural mother and has absolutely nothing to do with what is in the child's best interests.

The court's prejudice against plaintiff was made evident even before the ose of the trial. During plaintiff's direct examination, the following colloquy nsued between the court and the witness:

BY THE COURT:

Q Do you understand that in the eyes of the law Thaddeus is a bastard?

A I don't understand the definition of a bastard.

THE COURT: An illegitimate child born without the benefit of marriage?

A Yes.

MR. LETA: Your Honor, I would like to just make one mention of the record in this case, which indicates that Judge Duram [sic] has found the child to have been adopted for all purposes.

Q (By the Court) Well, I recognize the order is in there, but I understand that the law does provide that if the parents aren't married, that under the laws of this state, the child would be a bastard.

A I understand he's an illegitimate child, yes.

Q Do you understand that he would have obtained legitimacy through the act of marriage?

A Yes.

Q Why would you choose not to legitimize him through the act of marriage?

A I understood that he also gained legitimacy by being adopted.

Q Do you feel that you have any real conception or feeling about what changes a woman is going through during gestation, emotional changes and feelings that she goes through?

A During pregnancy?

Q Yes.

A I've attempted to understand those, yes.

Q Do you think you have got any conception or sensitivity about how that must be in a state of being not wedded?

A I would say that I attempted to understand the feelings and other things that were going on with Barbara. I don't believe that that was all that was going on with Barbara. In fact, the issue of marriage, she was strongly against being marriaed, and she only became interested in getting married after Thaddeus was born.

Q Do you feel that during that particular period a woman need a little extra support and understanding?

A I feel that both people need support, but, yes, I do feel the woman needs support, and I felt that I gave her extremely--a lot of support.

Q Do you feel that you provided that?

A Yes.
(R. 321, 322)

And, during the hearing on plaintiff's post trial motions, the court made the following remarks:

> THE COURT: . . . You may find, if it's not in there, that he got the gal pregnant and he refused to marry her and was insensitive generally to the female problems that she went through in terms of childbirth, and in fact has parents in the state of Connecticut, and that he by his conduct or actions discouraged her from going back where she belonged. (R. 382)
>
> * * *
>
> THE COURT: The only conclusion I reach from that evidence is that he's less than sensitive about what his individual responsibilities might be. And to say that he is the most responsible and most fit under those circumstances is shocking to the Court's conscience. (R. 386)

The court obviously measured plaintiff's fitness by its subjective perception of his moral responsibility under the circumstances, although no such standard was applied to the defendant or recognized in law.

The court also based its custody decision on an absolutely erroneous application of the "maternal presumption." In its conclusions of law the court states:

> 2. Under case law in the State of Utah and under the common law of this State there is a presumption that a child of tender years should be in the custody of their mother unless the mother is unfit. In this case, no evidence has been presented that the mother is unfit to care for the child. Absent such a finding, custody should be awarded to the mother of the child. This conclusion is in addition to and is distinct from Conclusion of Law number 1 above. (emphasis added)

This standard has no support in the current law of this state as will be shown below.

Finally, the court applied a test respecting joint custody which, in effect, precluded such an award, even if such were in the best interest of the child. The court refused to even consider joint custody unless the parties were able to "negotiate" an arrangement on their own. At the conclusion of trial the court said:

> . . . The child needs some stability and consistency, which the experts recognized. They both recognize that the solution to joint custody is an ideal situation which is not in touch with the reality of this particular case. I have no reason to believe that she's going to disobey the Court's order about providing him access to his child, encouraging a good relationship. She performed admirably well under strange and strained circumstances. It's just unusual and out of the ordinary that a man assume the role you have taken during the pendency of these kinds of proceedings. You initated the action, and apparently there was some splitting up and sharing up to that particular time, and there's evidence that you do have problems that you can't see eye to eye on, you have differences that you can't resolve on your own, and the joint custody relationship contemplates the situation where maybe the child can live in a close neighborhood with the two of you, the child can have one set of friends and a school that they rely upon, where the two parents can get together as adults and do everything, I suppose, but live together, and be able to handle their problems as a man and wife. (emphasis added) (R. 362-363)

The foregoing supports the conclusion that the trial court (a) measured plaintiff's "fitness" to have custody by his unwillingness to "legitimate" the child by marrying the defendant and by his "insensitivity" toward the defendant; (b) "presumed" that defendant should have custody unless she was unfit; and (c) refused to order joint custody unless the parties could "negotiate" the terms of the arrangement out of court. Each of these standards is erroneous and prejudiced plaintiff.

Plaintiff is the natural, biological father of the child in issue, and therefore is capable of adopting the child by acknolwedgment in accordance with § 78-30-12, Utah Code Annotated (1953). Mace v. Webb, 614 P.2d 647 (U. 1980). That statute provides:

> The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foreging provisions of this chapter do not apply to such an adoption. (emphasis added).

The plaintiff adopted the child pursuant to this statute as Judge Durham recognized and as the evidence unequivocably demonstrates. See, State v. Dennis, 594 P.2d 898 (Ut. 1979). Judge Rigtrup erroneously believed, however, that the "adoption" was not effective until Judge Durham entered her order on December 24, 1979 (R. 88), and that the child was a bastard from the time of its birth until that date. The statute clearly makes the child legitimate "for all purposes . . . from the time of its birth," contrary to Judge Rigtrup's belief.

Since the child was legitimate from birth, the proper test to apply in determining custody as between the natural parents would be to apply the law governing custody of legitimate children which is § 30-3-10, Utah Code Annotated (Supp. 1979). "The legislative purpose giving rise to [§ 78-30-12] is to confer on an illegitimate child the civil and social status of a lawful child of the natural father." Mace v. Webb, supra., at 648. See, In re Richard M., 122 Cal. Rptr. 531; 537 P.2d 363 (1975). Standards which prefer the natural mother of illegitimate children [See, e.g. § 77-60-12, Utah Code Annotated (1953)] have no place in custody disputes involving legitimate children.

Section 30-3-10 provides:

> In any case of separation of husband and wife having minor children, or whenever a marriage is declared void or dissolved, the court shall make such order for the future care and custody of the minor children as it may deem just and proper. In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties. The court may inquire of the children and take into consideration the children's desires regardng the future custody; however, such expressed desires shall not be controlling and the court may, nevertheless, determine the children's custody otherwise.

Although the statute seems to apply only to separations of "husband and wife" or situations involving "void or dissolved" marriages, it is proper to apply this standard in the instant case because the relationship between the parties is analogous to a void marriage under § 30-1-3(3), Utah Code Annotated (1953). Even though the parties made no effort to solemize their relationship, they held themselves out as husband and wife. Thus, the court erroneously prejudiced plaintiff by requiring him to show defendant's "unfitness" before he could obtain custody.

The trial court acknowledged that it was applying a strict maternal prefernce in the instant case. The most recent pronouncements of this court suggest that a maternal preference is proper only if all other things are equal between the parties. Otherwise, the sex of the parties plays no part in a custody dispute, and the best interests of the child must be the only consideration. "Whenever, pursuant to a consideration of such interests, any circumstances in the case preponderate in favor of the husband, all things are not equal." Jorgensen v. Jorgensen, 599 P.2d 510 (Ut. 1979). Assuming, arguendo, that such a "maternal preference" is constitutional, the trial court erroneously applied the preference in the instant case.

The circumstances in the instant case were not equal and clearly preponderated in favor of plaintiff. Both psychologists acknowledged that plaintiff was the more flexible and accommodating party. Plaintiff had superior financial capability and a more stable, permanent environment in which to raise the child. The court unjustifably ignored these differences and, in fact, erroneously believed that financial capability had "no bearing on the issue" (R. 311).

In the Jorgensen case, supra, one of the central considerations in support of the trial court's judgment that the father should be awarded custody was the fact that "plaintiff's present income was minimal" and that "defendant [was] responsible, [had] adequate employment, enjoy[ed] a particularly close relationship with his son, and [was] in all respects competent to care for him." Id. at 512. Here, the sexual bias in the lower court's decision can be seen most vividly by simply reversing the tables and

asking the rhetorical question "Would the court have awarded custody to this father if he were unemployed, had no permanent residence, had minimal earning capacity, were openly hostile and agressive toward his wife and had no definiate plans for the future?" The answer is obvious. The court's decision is contrary to the weight of the evidence and inconsistent with the standards announced by this court.

Finally, the trial court applied an improper standard for determining whether to award joint custody between the parties. While there is no statutory authority in Utah permitting "joint custody" between divorced or separated parents (nor even a definition of the term), there is also no legal prohibition of a joint custody arrangement. In several cases this court has acknowledged that "split" or "joint" custody is a proper form of relief and can be in the child's best interest. The court, however, has never instituted a test or standard for making such an award. See Sanders, Division of Clinical Custody in Utah, pp. 47-51, Utah Bar Journal, Spring 1977.

Joint custody has been defined as giving both parents "legal responsibility for the children's care and alternating companionship." Bodenheimer, Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Primitive Decrees, Joint Custody and Excessive Modifications, 65 Cal.L.Rev. 978, 1009 (1977). There has been no uniform application of the term "joint custody" and no single management which results when a joint award is made. Joint or divided custody decrees generally give both parents legal responsibility for the child's care.

Professional child psychologists are evenly split on the merits of joint custody, although there is almost universal recognition that children of divorce are subject to severe strain, loss of security and feelings of rejection. Roman, The Disposable Parent, 15 Conciliations Courts Review, No. 2, Del. 1977. The most strenuous arguments in opposition are that children in joint custody arrangements may suffer a lack of stability in their home environment or may fall prey to loyalty conflicts in attempting to maintain positive emotional ties to two hostile adults. Goldstein, et al., Beyond the Best Interests of the Child 37-38 (1973).

On the other hand, proponents argue that fathers who have only "visitation" are relegated to seeing their children only intermittently, experience feelings of deep loss and often overreact by limiting their involvement with their children. Roth, The Tender Years Presumption in Child Custody Disputes, 15 J. Fam L. 423 (1977); Annot. 70 A.L.R. 3d 262 (1976). Further, there is no scientific data for the de facto preference in favor of mothers. In todays world of two career families, fathers are equally nurturant and competent to care for their offspring. See eq., Molinoff, Joint Custody: Victory for All, N.Y. Times 3-6-77, XXII 18:1. Finally, and most importantly, a child needs a substantial involvement with both his parents.

In the instant case, both psychologists recommended that joint custody be imposed by the court and each testified that such an arrangement would be "ideal" and "best" for the child. The trial court found that each party was "fit" to have custody of the child (R. 172, paragraph 8). In fact, custody had been "divided between the parties pursuant to the order of the

Court" for over five months before trial (R. 172, paragraph 7). The court also found that "the best interests of the child would be served by maintaining a strong relationship with both parents" (R. 172, paragraph 9). Nevertheless, the court refused to award joint custody because it was "opposed" by defendant and because defendant planned to move to Connecticut.

Plaintiff concedes that where the parties live a great distance from one another a joint custody arrangement on an equal-time basis is difficult, especially for young children. However, something less than equal time could have been ordered (Ex. P-1) under the circumstances. More importantly, both the court and the psychologists were mislead by defendant's statement about her future plans. As will be discussed below, defendant did not intend to leave the state permanently and in fact has been living in Salt Lake City, Utah, on a continuous basis since June, 1980.

Of equally serious consequence is the court's conclusion that joint custody could not be awarded because it was "opposed" by the defendant. Such a standadrd would render the court impotent to make an award which is best for the child simply because one parent opposes it. "A court must, in a custody dispute, give the highest priority to the welfare of the children over the desires of either parent." Kallas v. Kallas, 614 P.2d 641, 645 (Ut. 1980). Obviously, whenever a matter is contested it will be "opposed" by one party. Thus, if the court's standard represents the law, no court could ever award joint custody in a contested case.

Both psychologists found the parties to have "similar parenting skills and styles." This should be the test in making an award between parents who are equally fit because it insures consistency and stability for the child and, at the same time, enables the child to develop a strong bond with both parents. This court should disavow the trial court's test and announce a proper standard to apply in resolving joint custody disputes. See Miller, Joint Custody, 13 Fam.L.Q. 1979, pp. 369-74.

In summary, the trial court applied erroneous legal standards in this case. The court prejudiced plaintiff's right to custody because the child was born out of wedlock in spite of the child's adoption "from birth" pursuant to § 78-30-12. The court applied an absolutely erroneous "maternal preference test which required plaintiff to show defendant's "unfitness" before he could obtain custody. And, the court applied an inappropriate test for determining whether joint custody would be in the child's best interest.

II

THE COURT'S FINDINGS AND CONCLUSIONS ARE NOT SUPPORTED BY THE EVIDENCE AND CONSTITUTE AN ABUSE OF DISCRETION.

Since a child custody proceeding is equitable and is based primarily and foremost on the welfare and interests of the minor children, this court can review the evidence and make an independent judgment about the proper resolution of the case, as well as determine whether the court abused its discretion. In the case at bar, the findings and conclusions are simply not supported by the evidence.

In its conclusions, the trial court said:

> 1. Considering all the circumstances, the best interest of the child Thaddeus Justin Lembach would be served by awarding Defendant sole and exclusive custody, subject to reasonable visitation by Plaintiff.

The court's own findings, however, do not support this conclusion. For example, the only findings of the court on the question of which parent should have custody are the following:

> 5. Since October 1977, Plaintiff has maintained a residence in Salt Lake City, Utah at 781 First Avenue.
>
> 6. Since January 1, 1978, Defendant has not maintained any permanent employment between 8/15/78 and 6/6/79 and had primary responsibility for the care of the child of the parties. At the time of the trial Defendant was receiving public assistance from the State of Utah.
>
> 7. Since October 2, 1979, custody of the minor child has been divided between the parties pursuant to the Order of this Court.
>
> 8. Defendant is a fit and proper person to have custody of the child of the parties. Plaintiff is fit to have custody of the child.
>
> * * *
>
> 11. Defendant plans to move to Connecticut to be close to her family.
>
> 12. Plaintiff is employed full-time by Omni Structures and earns approximately $8.00 per hour or $16,000 per year.

Clearly, these findings support the conclusion that plaintiff is more financially secure and more stable than is defendant. Since all other findings are either neutral or equal as between the parties, a preponderance of the evidence, by the court's own findings, compels the conclusion that the best interests of the child would be served by awarding custody to plaintiff, not defendant.

Without repeating what has been said above, the testimony at trial further demonstrates that the court's decision was arbitary. It is blatently obvious from the record that the trial court was biased against plaintiff because of his decision not to marry defendant, because of an erroneous misunderstanding about the effect of adoption pursuant to § 78-30-12, and because of a total misunderstanding of the "best interests" doctrine in this state.

III

APPLICATION OF ANY SEXUAL PREFERENCE IN CHILD CUSTODY DISPUTES IS UNCONSTITUTIONAL, LACKS ANY SUBSTANTIAL RELATIONSHIP TO AN IMPORTANT STATE INTEREST, AND IS CONTRARY TO LAW.

From the foregoing discussion, it is apparent that the trial court discriminated against plaintiff because of his sex in at least three ways. First, the court imposed a great burden of proof upon plaintiff that it did upon defendant. Second, the court did not weigh the evidence in the same fashion for both parties, as when it discounted plaintiff's financial ability and his more stable home environment while placing an unwarranted premium upon defendant's nurturing ability because of her sex. Finally, the court discriminated against plaintiff by applying a legal standard which presumed that defendant should have custody unless plaintiff could prove that she was "unfit."

Setting aside for the moment the fact that the court did not properly apply the "maternal preference" as outlined by this court in Jorgensen v. Jorgensen, supra, any preference for one of the parties because of sex, even as permitted by Jorgensen, is unconstitutional and warrants reversal.

The right of a parent to the care, custody and nurture of his child is such a precious and fundamental right of all citizens that it cannot be deprived in a manner inconstistent with the equal protection clause of the Fourteenth Amendment. As the United States Supreme Court said in Stanley v. Illinois, 405 U.S. 645, 651-52 (1972):

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," . . . "basic civil rights of man," . . . and "[r]ights far more precious . . . than property rights." . . . "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." . . .
>
> Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. The Court has declared unconstitutional a state statute denying natural, but illegitimate, children a wrongful-death action for the death of their mother, emphasizing that such children cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit. . . . "To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue." For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses." . . .
>
> These authorities make it clear that, at the least, Stanley's interest in retaining custody of his children is cognizable and substantial. (citations omitted)

Recently, the court again addressed this issue in Caban v. Mohammed, 441 U.S. 380 (1979) where it held that a state statute which makes distinctions between the rights of unmarried mothers and the rights of unmarried fathers cannot withstand constitutional scrutiny under the equal protection clause unless it can be shown to be "substantially related to an important state interest." In that case, the court found no justifiable basis for making any gender-based distinctions in connection with the right of natural parents to withhold consent in adoption proceedings.

A "maternal preference" in resolving custody disputes, whether applied only as a "tie-breaker" or otherwise, has no place under the equal protection clause of either the Fourteenth Amendment or the Utah Constitution. (Article I, § 2). There is no "substantial governmental objective" which such a preference serves and it would not be "substantially related to the achievement of those objections" if any could be concocted. Moreoever, such a preference is purely a creation of this court, which is contrary to legislative intent since it modifies the otherwise plain meaning of the 1977 amendment to § 30-3-10, Utah Code Annotated (1953). The presumption also lacks vitality in fact. Roth, the Tender Years Presumption in Child Custody: Victory for All, supra; Annot. 76 A.L.R.3d 262.

Without the benefit of facts supporting an "adoption" under statutes like §78-30-12, Utah Code Annotated (1953), several courts have held that there are no presumptions in favor of the mother in a custody proceeding involving an illegitimate child and that the only standard is the "best interest of the child." Godinez v Russo, 49 Misc.2d 66; 266 N.Y.S.2d 636 (1966); Commonwealth v Martin, 381 A.2d 173 (Pa. 1977); Bazemore v. Davis, 394 A.2d 1377 (D.C. App. 1978); In re Domingo T., 48 L.W. 2208 (N.Y. Family Ct. 1979).

In addition, several courts, including the Supreme Court of Nevada, (Arnold v. Arnold, 604 P.2d 109 (Nv. 1979)) have abolished the maternal presumption in all child custody disputes, even as a tie-breaker, for the reason that the presumption is a judicial crutch for avoiding the often

difficult decision of the child's best interest. See, also, McAndrew v. McAndrew, 46 L.W. 2462 (Md. 1978); Commonwealth v. Carson, 368 A.2d 635 (Pa. 1977). The Nevada court's discussion in Arnold is particuarly noteworthy because of the striking similarity between the law in Nevada and in Utah. Finally, at least one state court has held that the maternal preference is unconstitutional under the equal protection clause. State ex rel. Watts v Watts, 350 N.Y.S.2d 285 (1973).

Preferences and presumptions should play no role in child custody disputes. The children in issue deserve standards which realistically advance their best interest. In todays world mothers do not hold a monopoly on the subject of child rearing and in many situations can be a worse role model than a working father. The choice of which parent is "best" for the child seldom is often difficult, especially where both parents want the child. But the choice must not be avoided by the use of easy, inadequate preferences and assumptions.

For these reasons, this court should reverse the trial court and should take this opportunity to abolish the maternal preference in all child custody disputes.

IV

IT WAS ERROR TO DENY PLAINTIFF'S MOTION FOR A NEW TRIAL.

After the trial, plaintiff moved for a new trial on the basis of newly discovered evidence showing that defendant intended to make Utah, not Connecticut, her home (R. 104). Before trial, plaintiff had sought the production of all public assistance applications submitted by defendant since July 1, 1977 (R. 29, no. 7). The documents were not produced prior to trial because defendant claimed that they could not be obtained from the public authorities, and plaintiff could not obtain the documents directly because of various privacy limitations.

The application which was finally produced (R. 108) was submitted on November 5, 1979, and contains an affirmative answer, under oath, to the question "Do you intend to make your home in Utah?" (R. 108, no. 12). The application also contains material information about defendant's income, property, residence and financial affairs, all of which were important facts for the court to consider in connection with the custody issue.

In support of the motion, plaintiff also submitted the affidavit of Dr. Cooper (R. 165) which states that had he known about defendant's prior sworn statement at the time he conducted his interviews he "would have questioned her much more thoroughly about her stated intent to return to Connecticut to live with her parents and this fact also would have played a role in [his] recommendation."

The evidence shown by this application was extremely important and warranted a new trial. First, it tends to impugn defendant's credibility and honesty, which not only creates doubt about other aspects of her testimony, but also raises serious implications about her moral standing and character as a parent. It suggests that defendant is willing to lie or stretch the truth for the purpose of manipulating the rules to her own advantage. Second, it directly contradicts her stated intent to leave Utah which was a central consideration in the joint custody determination. Finally, it seriously hampered plaintiff's ability to purge defendant's testimony on cross-examination. Because of the character of this evidence, and its importance to the issues in dispute, a new trial was warranted under the standards governing such motions. See, Rule 59, Utah Rules of Civil Procedure; 6A Moore's Federal Practice, paragraph 59.08[3] (2nd Ed. 1979); Denial of the motion under the circumstances constituted an abuse of discretion.

CONCLUSION

The foregoing discussion demonstrates that the trial court did not understand the proper legal standards to apply in resolving the issues in dispute between the parties. The court measured plaintiff's fitness by subjective standards of morality concerning whether it would have been right or proper for the plaintiff to "legitimate" the child by marrying the defendant in spite of the clear language of § 78-30-12 to the contrary. The court further prejudiced plaintiff's ability to obtain custody by requiring the defendant to somehow cure a perceived "insensitivity" to the defendant. There is no support in the law in this state for standards and burdens of

this kind. Moreover, since these tests were not applied to both parties, the injury to the plaintiff is more manifest.

The court also failed to understand the proper application of the maternal presumption or tender years doctrine. The court assumed that a child of tender years should be with its mother unless the mother is "unfit." In fact, the doctrine only applies in the case of a tie when all things are equal between the parties. The application of this standard prejudicially increased plaintiff's burden of proof. The court's standard for resolving the joint custody question was not only unrealistic and unworkable but also contrary to the child's best interest.

The trial court not only applied erroneous standards of law in resolving the dispute but its decision is not supported by a preponderance of the evidence and demonstrates an abuse of discretion. The situation between the parties was far from equal and, as the court's own findings illustrate, was weighted in favor of the plaintiff. Both plaintiff and defendant were acknowledged by all to be "fit" parents. There is nothing in the evidence, and in particular in the court's findings, to illustrate why the plaintiff was less fit than the defendant or, for that matter, why the defendant was more fit than the plaintiff. However, the record is clear, that plaintiff's income exceeded that of the defendant, that his work and employment history were more regular and stable than that of the defendant, and that his home environment was more stable and permanent than that of the defendant. Moreover, both psychologists testified that plaintiff was more accommodating and flexible than was the defendant. These differences, under the

circumstances, were not insignificant; they tipped the scales of "best interest" in plaintiff's favor. Disregarding these differences, renders the trial court's conclusions wholly arbitrary and capricious.

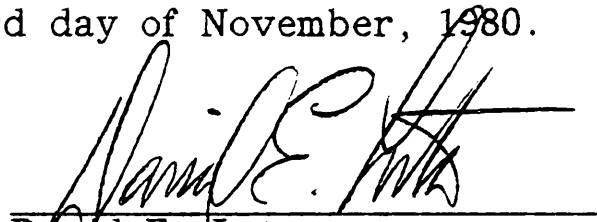
The trial court also discriminated between the parties on the basis of sex. Such discrimination has no place in the resolution of a child custody dispute where the parties have an equal right to the care, custody and nurture of their child. Application of any discrimination, including the maternal presumption as currently applied by the courts of this state, is an unconstitutional violation of the equal protection clause in the Fourteenth Amendment and in Article I, Section 2 of the Utah Constitution.

Finally, the court abused its discretion in failing to grant plaintiff a new trial because the newly discovered evidence was of a material and substantial nature and would have probably affected the outcome of the trial.

For all of these reasons, therefore, this court should reverse and remand the case to the district court with directions to enter judgment in favor of plaintiff that he be awarded custody of the child with liberal and reasonable visitation for the defendant or, in the alternative, reverse and remand the case to the district court for a new trial with directions as to the

proper standards to apply in resolving the issues in dispute between the parties.

Respectfully submitted this 3rd day of November, 1980.



David E. Leta
ROE AND FOWLER
340 East Fourth South
Salt Lake City, Utah 84111
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of November, 1980, I served the attached Brief of Appellant upon Bruce Plenk, Esq., attorney for respondent, by depositing two copies thereof in the United States mails, postage prepaid, addressed as follows:

Bruce Plenk, Esq.
Utah Legal Services
352 South Denver Street
Salt Lake City, Utah 84111